TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 229

LUCY B. BROOKE, PETITIONER,

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR CERTIORARI FILED APRIL 25, 1927

CERTIORARI GRANTED JUNE 6, 1927

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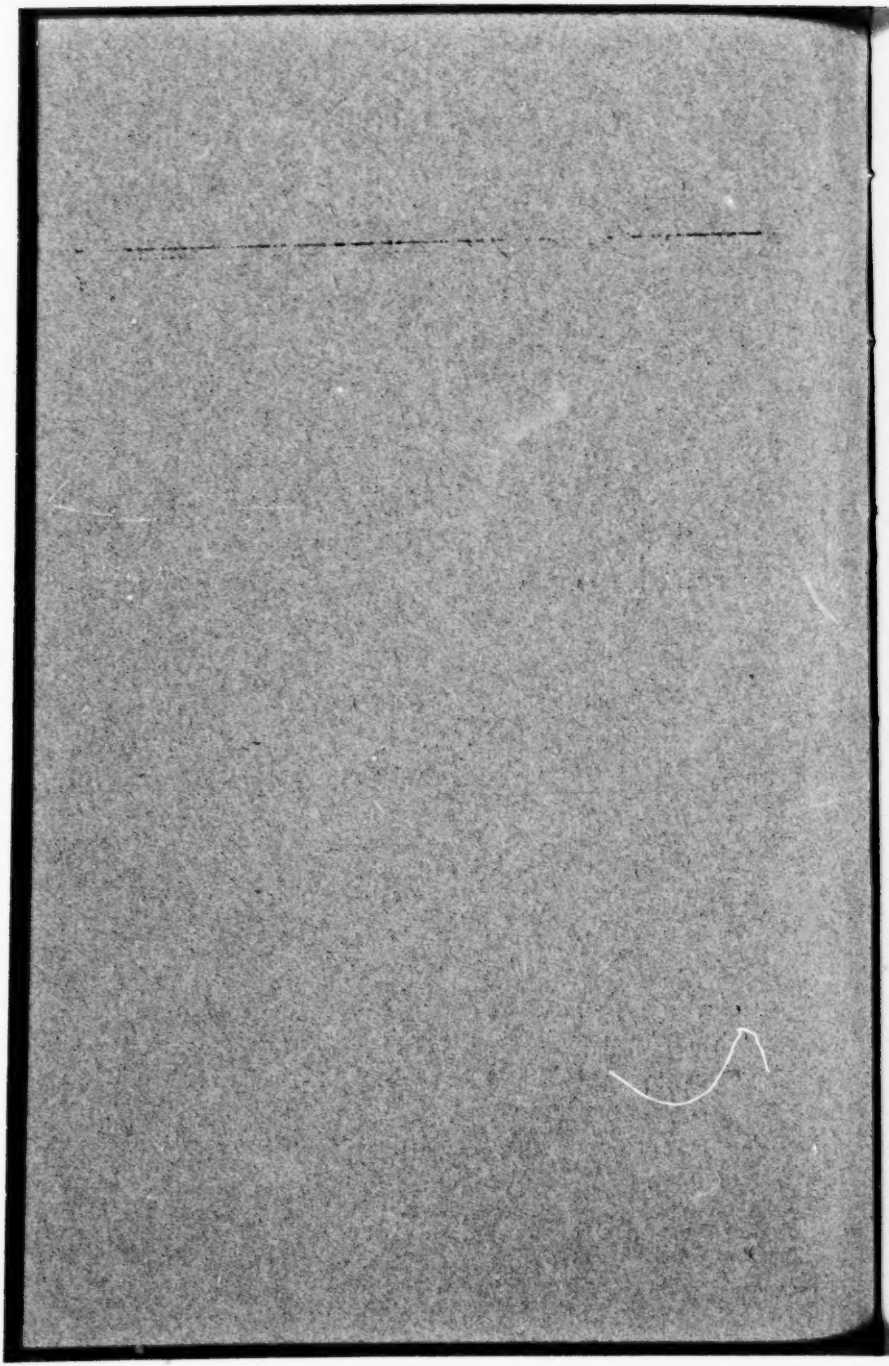

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 11, 1927

[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

LUCY B. BROOKE, Plaintiff,

v.

CITY OF NORFOLK, a Municipal Corporation, et als., Defendants

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Lucy B. Brooke, widow of D. Tucker Brooke, deceased, respectfully represents that she is aggrieved by a judgment of the Corporation Court of the City of Norfolk, entered on the 20th day of November, in the year 1926, in consolidated proceedings instituted by your petitioner against the City of Norfolk and others for the purpose of having corrected certain erroneous assessments of personal property for taxation, by which said judgment your petitioner was denied the relief sought. A transcript of the record in the said consolidated proceedings is herewith filed and is prayed to be taken and read as a part hereof.

[fol. 2] Statement of the Case

The record in the case is very brief, consisting merely of two applications made by Mrs. Brooke for the correction of erroneous assessment of taxes and the returns and orders thereon. The judgment, found at page 15 of the typewritten transcript and subsequent pages, recites that the two proceedings involve identical question of fact and law except in the matter of the years for which the assessments were prayed to be corrected, and consolidates the two proceedings. It further shows that the Commissioner of the Revenue and the Examiner of Records, the two officers making the assessments complained of, were examined touching the applications and testified that the matters of facts set

up in the applications were true, but that in their judgment the conclusions sought to be drawn from the facts by Mrs. Brooke were incorrectly drawn. The case, therefore, while not standing upon a technical demurrer, is yet presented to the court as though upon a demurrer to the allegations of the applications.

From the applications it appears that prior to January 28, 1914, Eliza Andrews, who for many years prior to her death was a citizen and resident of the City of Baltimore, [fol. 3] had made a will, which was duly probated in the proper court of Maryland, and was, on the 28th day of January, 1914, admitted to probate in the Corporation Court of the City of Norfolk, as a foreign will. By the terms of this will Miss Andrews gave and bequeathed to the Safe Deposit and Trust Company of Baltimore the sum of Eighty Thousand Dollars ($80,000) in trust to pay the net income to Mrs. Brooke for her life, and after her death to pay one-fifth of the income to each of Mrs. Brooke's five daughters, and, after certain trusts not necessary to be here set forth, upon the death of the last survivor of the daughters, to divide the principal between the descendants of the daughters per stirpes. It further appears that this bequest has been complied with by the delivery to the Safe Deposit and Trust Company of Baltimore as trustee of the property mentioned in the will; that the said company as trustee has ever since held the property so delivered to it in the State of Maryland, and City of Baltimore; that the property has never been in the City of Norfolk or anywhere else than in Baltimore; that the property has been continuously taxed in the State of Maryland and City of Baltimore and the tax paid by the trustee; that Mrs. Brooke is ignorant as to the nature of the property in which the fund is invested, and neither has exercised any control over the property, nor [fol. 4] has any authority to direct the investment thereof, nor to dispose of it; that Mrs. Brooke cannot call the trustee to account for any of its acts as trustee in any court in the State of Virginia, and that no process of any court in the State of Virginia can reach or touch the property or the trustee; that the trustee refuses to recognize as valid any tax levied on the property by the State of Virginia or any municipality thereof; and that though requested by Mrs.

Brooke to join in these proceedings, the trustee has refused to do anything whatever in the matter.

The applications further show that Mrs. Brooke has regularly returned her income from the property to the State of Virginia for taxation, and the thing complained of is the imposition of taxes by the State of Virginia and by the City of Norfolk upon the corpus of the estate.

The applications set forth that the imposition of the taxes on the corpus in the hands of Mrs. Brooke is in contravention of the fourteenth amendment of the Constitution of the United States; and it is expressly stipulated, as recited in the order (Transcript p. 17), that if the assessments in question are in contravention of the Constitution of the United States the relief prayed for should be granted. [fol. 5] Your petitioner, accordingly, assigns as error the action of the Court in entering judgment denying to your petitioner the relief so prayed for.

The case then presents sharply for decision the question whether a state or any political subdivision thereof can consistently with the provisions of the fourteenth amendment, tax to a resident beneficiary for life, the principal of a trust estate created by a non-resident, in favor of a non-resident trustee, the subject matter of the trust being held by the non-resident trustee outside of the estate free from control of the resident beneficiary and without accountability to the resident beneficiary in any of the courts of the state, the subject matter of the trust thus receiving no protection from the state, or any political subdivision thereof, or by reason of its laws.

Discussion

It is Mrs. Brooke's contention that the question just stated is answered in the negative by certain recent decisions of the Supreme Court of the United States hereafter to be discussed.

It may frankly be conceded that several decisions of this court appear to point to a contrary conclusion, although it [fol. 6] may be doubted whether in any of those cases quite as strong a combination of facts from the standpoint of the taxpayer was shown to exist as in the present instance. We take leave briefly to review the Virginia decisions and

shall then discuss the matter in the light of the decisions of the Supreme Court of the United States above referred to, which were made after the latest of the Virginia cases bearing on the subject.

In Selden v. Brooke, (1906), 104 Va. 832, the question was as to the validity of taxes assessed by the City of Norfolk upon a trust fund consisting of intangible property in the hands of a non-resident trustee, in the income from which a resident beneficiary had a life estate. The trustee was there appointed by decree of the Corporation Court of the City of Norfolk, which had jurisdiction over the fund. It was held that the fund was taxable in Virginia. It is quite apparent that the fact that the fund was created in Virginia was not without its effect on the minds of the court, for in deciding the case the court pointed out that if the domicile of a non-resident trustee were to fix the situs of intangible property for taxation, there would be afforded a "ready means of escape from taxation". A quite different situation exists in the present case where the fund prior to the creation of the trust was never in Virginia, [fol. 7] where there is no control of it by any court in Virginia, and where consequently no question of "escaping" from taxation arises, but the question is whether the existence of a Virginia beneficiary is to have the effect of making that taxable by the state which was not taxable before.

The point under the Federal constitution which we shall urge here does not seem to have been presented in the case under consideration. The court said:

"The contention that the construction indicated would render the statute unconstitutional, proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the State treasury."

We are not proceeding here on the hypothesis that the tax is unconstitutional because it is against a non-resident trustee, but, as will be hereafter shown, upon the hypothesis that it is unconstitutional because the thing taxed is not within the jurisdiction of the state.

So also in Wise v. Commonwealth (1918), 122 Va. 693, the fund from which the trust was created originated in Virginia and was made the subject of a trust in favor of a non-[fol. 8] resident trustee, but having some Virginia beneficiaries. This circumstance, again, seems to have affected the court in holding the trust fund subject to taxation in Virginia. The Court said:

"If it were otherwise, citizens of this state could, by creating foreign trusts, deprive the state of a very large part of its revenue."

In Franklin Trust Co. v. Booker (1918), 122 Va. 680, however, a case was presented where the fund itself had never been within the state. The constitutional point upon which we rely does not, from the report of the case, appear to have been distinctly presented; and the court held the fund taxable upon the authority of a simple reference to the Wise case just discussed.

Likewise, in Ellett v. Commonweath (1922), 132 Va. 136, on a state of facts apparently identical with that in the Booker case, this court in a per curiam opinion held the fund taxable, contenting itself with a mere citation of the cases discussed above.

As intimated at the outset of this discussion, the present case exhibits certain characteristics of fact which do not appear to have existed in the cases reviewed. For example, it does not appear from them that the trust had been subjected to taxation by the state in which it was held. In some of [fol. 9] the cases the fund originated in Virginia. In none of them does the constitutional point appear to have been made which we now present to the court.

That point may be stated thus: That a state can tax only that property of which it has jurisdiction; that it has jurisdiction only of such property as is within the state; that the only theory upon which intangible personal property physically located outside of the state can be held to be within its jurisdiction is that the situs of that property is the domicile of the owner, in accordance with the maxim mobilia sequuntus personam; that this maxim is but a maxim of convenience, based upon the owner's presumed dominion over the property, and embodies a legal fiction which yields to the fact in any case where the

fact can be made indubitably to appear; that the fiction has so yielded to fact in the matter of tangible personal property; and that it must likewise yield to fact in the case of tangible personal property where the manner in which that property is held is such as to exclude the possibility of the dominion over it of the person beneficially interested, and consequently the hypothesis that its situs is or can be at that person's domicile; and that if, as the Supreme Court of the United States has held, tangible personal property habitually kept by the owner outside of the state of his domicile is not subject to taxation in that state, al- [fol. 10] though it would be at any time within the power of the owner to bring that property into the jurisdiction of the state, there is far more reason for holding that intangible personal property which is located without the state and which the person benficially interested could not, even if he wanted to, possibly bring within the state, is not subject to taxation by the state of that person's domicile.

In Frick v. Pennsylvania (1925), 268 U. S. 473, 69 L. Ed. 1058, one of the important questions was whether the art collections of the late Henry C. Frick, a citizen of Pennsylvania, which Mr. Frick kept in the City of New York, were subject to a tax imposed by the State of Pennsylvania on the transfer of property by will or intestate. It was held that such property was not so taxable.

In reviewing the former decisions of the Supreme Court bearing on the subject, that court said (268 U. S. at pages 488-9, 69 L. Ed. at page 1062):

"These decisions show, first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law, in violation of the 14th Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra ter- [fol. 11] ritorial operation; and, thirdly, that, as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicil of the owner. Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 319, 325, 21 L. Ed. 179, 186, 188; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 47 L. Ed.

513, 518, 23 Sup. Ct. Rep. 463; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 49 L. Ed. 1059, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 356, 49 L. Ed. 1077, 1083, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 38, 54 L. Ed. 366, 370, 30 Sup. Ct. Rep. 190; International Paper Co. v. Massachusetts, 246 U. S. 135, 142, — L. Ed. 624, 629, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918 C, 617."

Among the decisions of the Supreme Court holding tangible personal property permanently located outside the state to be nontaxable, are Delaware, etc. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, dealing with the tax upon the value of capital stock represented in part by assets (in that case, coal which had been mined) outside the state; and Union Refrigerator etc. Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150, involving the tax on refrigerator cars permanently located outside the state. [fol. 12] In the latter of those cases the court said:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land, which, to be taxable, must be within the limits of the state. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state, *must* less where such action has been defened by any court. It is said by this court in the Foreign-held Bond Case, 15 Wall. 300, 319, 21 L. Ed. 179, 186, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised. The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is

not beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws."

So, too, in Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, at page 22, L. Ed. 613, at page 616, the Court said:

[fol. 13] "No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the laws of any other state. The old rule expressed in the maxim 'mobilia sequunter personam', by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs,—the law os the place where the property is kept and used."

It is quite true that in several of these and other cases decided by the Supreme Court of the United States, a distinction is drawn between tangible personal property and intangible personal property where the latter is under the absolute control of the owner, but the decisions clearly indicate that when a case shall be presented in which the actual situs of intangible personal property is fixed by the instrument under which it is held—as for example in the case of the creation of a trust—the court will hold intangible [fol. 14] property so situated to be clearly without the jurisdiction of a state other than that in which the property is held, and in which only it can legally be held.

Such a situation was presented to the Supreme Court very recently in the case of Wachovia, etc. Co. v. Doughton, decided November 29, 1926 (Adv. Ops. 15, 1926, 250). In that case, a resident of Massachusetts gave by will to the Springfield Safe Deposit & Trust Company, a corporation of Massachusetts, a certain estate in trust, the net income from one-half of which was to be paid to his daughter during her life and at her death to be transferred to such persons as she might appoint, or in default of payment to her

issue. The daughter, after her father's death, resided in North Carolina where she died in 1921 leaving an infant child and a will by which she directed that the property so in the hands of the Springfield Safe Deposit & Trust Company should be divided between her husband and child. A statute of North Carolina directed that the transfer of all property passing by will or intestate laws should be subject to a tax, and that the exercise of the power of appointment should be deemed a transfer taxable under the provisions of the act, in the same way as though the property to which the appointment related had belonged to the donee of [fol. 15] the power and had been disposed of by will. In deciding that the estate in question was not subject to transfer tax by North Carolina, the court said:

"We think the assets of the trust estate established by the will of Haynes had no situs, actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the state where Mrs. Taylor happened to have her domicil. No right exercised by the donee was conferred on her by North Carolina A state may not subject to taxation things wholly beyond her jurisdiction or control. Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603.

It would be easy to multiply the citation of cases illustrating and emphasizing the point here relied upon, but your petitioner has felt that the cases of Frick v. Pennsylvania, supra, and Wachovia, etc. Co. v. Doughton, supra, both decided by the Supreme Court after the latest opportunity offered this court of passing upon the question—although, we repeat, the constitutional question presented by us does not appear to have been distinctly before this court—so effectively meet the situation as not to justify a more extended treatment.

[fol. 16] Conclusion

The judgment of the lower court should be reversed.

For these and other errors apparent on the fact of the record, your petitioner prays that a writ of error may be awarded her to the judgment hereinabove complained of.

Lucy B. Brooke, by Nath'l T. Green, Robt. B. Tunstall, Counsel.

We, Nathaniel T. Green and Robt. B. Tunstall, counsel practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in our judgment it is proper that the judgment hereinabove complained of should be reviewed by this honorable court.

Nath'l T. Green, Robt. B. Tunstall.

Received Jan. 27, 1926. H. S. J.

[fol 17] In Corporation Court of City of Norfolk

Lucy B. Brooke, Plaintiff,

against

City of Norfolk, a Municipal Corporation, etc., Defendants

Application for Correction of Erroneous Assessments—Filed July 31, 1925

To City of Norfolk, a Municipal Corporation, and R. W. Peatross, its Attorney; A. Plummer Pannill, Commissioner of Revenue of the City of Norfolk; Thomas H. Willcox, Jr., Commonwealth's Attorney for the City of Norfolk; W. I. Gilkerson, Examiner of Records:

Take notice that the undersigned will, at 10:00 o'clock A. M. on Friday, the 7th day of August, 1925, apply to the Corporation Court of the City of Norfolk, Virginia, for redress against, and move said Court to correct, an erroneous assessment of City taxes, in favor of the City of Norfolk, [fol. 18] against her, and to that end alleges that she is aggrieved by an entry in the Personal Property Book, made for the year 1923, at page 417, line number 17, of said book, whereby the undersigned is charged with One Hundred and Thirty-one Dollars and Eighty-four Cents ($131.84) City taxes, in favor of the City of Norfolk, for the year 1923, on bonds, notes and other evidences of debt shown thereby to be assessed at the sum of Sixty-five Thousand Nine Hundred Twenty ($65,920.00) Dollars, which said assessment of said bonds, notes and other evidences of debt, for said year, was made by W. I. Gilkerson, Examiner of Records, and as grounds for this application, the undersigned alleges the following facts:

First. Some time prior to the 28th day of January, 1914, one Eliza Andrews, who at the time of her death, and for many years prior thereto, was a citizen and resident of the City of Baltimore, in the State of Maryland, made a certain will and testament, by the seventeenth item of which she made the following bequest, under which the undersigned took certain interests as is therein set forth.

"Item 17. I give and bequeath to the Safe Deposit and Trust Company of Baltimore the sum of Eighty Thousand [fol. 19] Dollars ($80,000) in trust, however, to pay the net income to Mrs. Lucy Brooke, wife of D. Tucker Brooke, for and during the term of her natural life, and after her death to pay one-fifth of said net income to each of her daughters, to-wit: Lucy, Eloise, May, Lena and Marguerita during their respective lives, upon the death of any of said daughters without issue living at the time of her death, then the income payable to any such daughter to be paid in equal parts to her surviving sisters and the children of any deceased sister, the children of any deceased sister to take as a class the share which their mother would have taken if living, but upon the death of any of said daughters of said Lucy Brooke leaving issue living at the time of her death, then the income theretofore payable to said daughter shall be paid to her issue equally; all the aforesaid payments of income to continue until the death of the last survivor of the daughters of said Lucy Brooke; and upon the death of said last survivor, the trustee shall divide the said principal, to-wit, the said eighty thousand dollars ($80,000) between the descendants then living of the daughters of said Lucy Brooke per stirpes."

Second. That the said will of the said Eliza Andrews [fol. 20] was duly probated in the proper court of the State of Maryland as her last will and testament, and was subsequently, on the 28th day of January, 1914, admitted to probate in this Court as a foreign will, and recorded as such in Will Book No. 13 of the records of this Court.

Third. That the Safe Deposit and Trust Company of Baltimore, named as Trustee, in Item 17 of the will above mentioned, is a corporation of the State of Maryland, and that there was delivered to it, as Trustee, in the State of Maryland, the property and estate mentioned and de-

scribed in said Item 17 of said will shortly after the death of the testator, Eliza Andrews, and that said Safe Deposit and Trust Company of Baltimore, as such Trustee, has held said property so delivered to it, or the investments made therefrom by it, in said State of Maryland, and in said City of Baltimore, as said Trustee, ever since the delivery of said property to it, and that said property has never, at any time, since said delivery been in the State of Virginia, or the City of Norfolk, Virginia, or anywhere else than in the City of Baltimore, Maryland, and no part of said property is invested in Virginia, or in loans made in Virginia, or in the stock or bonds of any corporation existing under the laws of Virginia.

[fol. 21] Fourth. That the property so delivered to the said Safe Deposit and Trust Company of Baltimore has, ever since said delivery, been taxed in the State of Maryland, and the City of Baltimore, and that the taxes thereon have been paid by said Safe Deposit and Trust Company of Baltimore, which holds the same as Trustee.

Fifth. That there has been paid to the undersigned by said Safe Deposit and Trust Company of Baltimore, as Trustee, the net income derived from said property ever since its delivery to said Trustee, as provided in Item 17 aforesaid of the will of Eliza Andrews, and this income has been duly and properly returned by the undersigned for taxation in the State of Virginia, and the taxes on said income have been duly paid by the undersigned.

Sixth. That the undersigned is ignorant as to what is the nature of the property in which the fund held by said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the said will is invested; that she has and exercises no control whatsoever over the property so held by said Safe Deposit and Trust Company of Baltimore, and has no authority to direct the investment of the same, and has no right to dispose of the same, and cannot, in the Courts of this Commonwealth, call said Trustee to account, or cause it to account for any of its acts as said [fol. 22] Trustee; and that the State of Virginia itself has no jurisdiction over said Trustee, or over said property, and no process of any of its Courts, or of any of its Departments, can reach or touch said property or said Trus-

tee, and that the City of Norfolk is likewise without jurisdiction of said fund or said Trustee; and the said Trustee refused to recognize as valid any tax levied or assessed on said property so held by it as Trustee by either the State of Virginia, or any of the municipalities thereof, and, though requested by the undersigned to join in proceedings, of the kind now instituted by the undersigned, has refused to do anything whatever in said matter.

Seventh. That despite the facts above set forth, the Examiner of Records assessed against the undersigned for taxation all of the corpus of the property so held by the said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the will of Eliza Andrews, said assessment being the identical and same assessment sought herein to be corrected, and against which the undersigned hereby seeks redress, it being the same assessment hereinabove first mentioned and complained of, and there being no dispute or contention as to that fact.

Eighth. That, as will appear from said Item 17 of the [fol. 23] said will, the undersigned has no vested interest in the property passing thereby, and has only the right to the income therefrom during her life, and that she is charged with no duty relative to the preservation of the corpus of said property, but that this duty is on the Trustee, which holds the same, and that said property receives no protection whatsoever from the State of Virginia, or the City of Norfolk, or by reason of the laws thereof.

Ninth. That the undersigned alleges that the said assessment against her is illegal, null and void, as are the taxes charged against her by reason thereof, and particularly does she charge that said assessment and the taxes charged against her by reason thereof, are contrary to the Constitution of the United States, and especially the provisions of the Fourteenth Amendment thereof, in that it deprives her of her property without due process of law, by reason of the fact that it attempts to compel her to pay taxes, and causes her to be charged with taxes, on property which she does not own, and over which she has no control or authority; and further violates the Constitution of the United States, and the Fourteenth Amendment thereof, in that it denies her the equal protection of

the laws of the State of Virginia, by reason of the fact that she would thereby be compelled to pay taxes on prop-
[fol. 24] erty which she does not own, and over which she has no control, while other citizens of the State of Virginia are only properly taxed on property owned by them, except where the same situation exists as is the case with the undersigned.

The undersigned, therefore, applies to the Court, and moves it that it may correct and strike out the illegal assessment and charge of taxes against her aforesaid, and that she may be granted the proper redress herein against the same, and may be relieved from the payment of said taxes now, or in the future.

And she will ever pray.

Lucy B. Brooke, by Nath'l T. Green, Her Attorney.

Return

We accept service of this notice, this 27th day of July, 1925.

City of Norfolk, by R. W. Peatross, Its Attorney.
R. W. Peatross, Attorney for the City of Norfolk.
[fol. 25] A. Plummer Pannill, Commr. of the Revenue of the City of Norfolk. T. H. Willcox, Jr., Commonwealth's Attorney of the City of Norfolk. W. I. Gilkeson, Examiner of Records.

In Corporation Court of City of Norfolk

Submission of Cause—August 7, 1925

This day came the plaintiff, Lucy B. Brooke, and the defendants, City of Norfolk, R. W. Peatross, its Attorney, A. Plummer Pannill, Commissioner of the Revenue of the City of Norfolk, Thomas H. Willcox, Jr., Commonwealth's Attorney for the City of Norfolk, and W. I. Gilkerson, Examiner of Records, and the said Lucy B. Brooke applied to this Court for redress against, and moved this Court to correct the erroneous assessment of the City taxes, in favor of the City of Norfolk against her, mentioned in the notice of this application, and motion which has been

duly served upon all of said parties, and which is this day duly filed, and to said application and motion all of [fol. 26] said parties named as defendants herein appeared, and the same is thereupon duly docketed. And the Court not yet being advised as to its judgment upon said application, does continue the hearing of the same until a future term of this Court.

IN CORPORATION COURT OF CITY OF NORFOLK

APPLICATION FOR CORRECTION OF ERRONEOUS ASSESSMENTS—
Filed August 2, 1926

To City of Norfolk, a Municipal Corporation, and R. W. Peatross, its Attorney; A. Plummer Pannill, Commissioner of Revenue of the City of Norfolk; Harry E. McCoy, Commonwealth Attorney of the City of Norfolk, and W. I. Gilkeson, Examiner of Records:

Take notice, that the undersigned will, at 10 o'clock A. M., on Monday, the 2nd day of August, 1926, apply to the Corporation Court of the City of Norfolk, Virginia, for redress against, and move said court to correct, certain erroneous assessments of City and State taxes against her, and to that end the undersigned alleges that she is aggrieved by an entry in the personal property book made for the year 1924, at page 301, line 19, whereby the undersigned is charged with One Hundred and Thirty-one [fol. 27] Dollars and Eighty-four Cents ($131.84) for City taxes in favor of the City of Norfolk, and Two Hundred and Thirty Dollars and Seventy Cents ($230.70) for state taxes, both for the year 1924, and also by an entry in the personal property book made for the year 1925, at page 370, line 19, of said book, whereby the undersigned is charged with One Hundred and Thirty-One Dollars and Eighty-four Cents ($131.84) City taxes in favor of the City of Norfolk, and Two Hundred and Thirty Dollars and Seventy-two Cents ($230.72) state taxes for the year 1925; both of the said assessments being made on and in respect of bonds, notes and other evidences of debt shown thereby to be assessed at the sum of Sixty-five Thousand, Nine Hundred and Twenty Dollars ($65,920),

which said assessments of said bonds, notes and other evidences of debt for the said years 1924 and 1925, respectively, were made by A. Plummer Pannill, Commissioner of the Revenue for the City of Norfolk. And as grounds for this application the undersigned alleges the following facts:

First. Some time prior to the 28th day of January, 1914, one Eliza Andrews, who at the time of her death, and for many years prior thereto, was a citizen and resident of the City of Baltimore, in the State of Maryland, made a certain will and testament, by the seventeenth Item of which she made the following bequest, under which the [fol. 28] undersigned took certain interests as is therein set forth:

"Item 17. I give and bequeath to the Safe Deposit and Trust Company of Baltimore the sum of Eighty Thousand Dollars ($80,000) in trust, however, to pay the net income to Mrs. Lucy Brooke, wife of D. Tucker Brooke, for and during the term of her natural life, and after her death to pay one-fifth of said net income to each of her daughters, to-wit: Lucy, Eloise, May, Lena and Marguerita during their respective lives, and upon the death of any of said daughters without issue living at the time of her death, then the income payable to any such daughter to be paid in equal parts to her surviving sisters, and the children of any deceased sister, the children of any deceased sister to take as a class the share which their mother would have taken if living, but upon the death of any of said daughters of said Lucy Brooke leaving issue living at the time of her death, then the income theretofore payable to said daughter shall be paid to her issue equally; all the aforesaid payments of income to continue until the death of the last survivor of the daughters of said Lucy Brooke; and upon the death of said last survivor, the trustee shall divide the said principal, to-wit, the said eighty thousand dollars ($80,000) between the descendants [fol. 29] then living of the daughters of said Lucy Brooke per stirpes."

Second. That the said will of the said Eliza Andrews was duly probated in the proper Court of the State of Maryland as her last will and testament, and was sub-

sequently, on the 28th day of January, 1914, admitted to probate in this Court as a foreign will, and recorded as such in Will Book No. 13 of the records of this Court.

Third. That the Safe Deposit and Trust Company of Baltimore, named as Trustee, in Item 17 of the will above mentioned, is a Corporation of the State of Maryland, and that there was delivered to it, as Trustee, in the State of Maryland, the property and estate mentioned and described in said Item 17 of said will shortly after the death of the testator, Eliza Andrews, and that said Safe Deposit and Trust Company of Baltimore, as such Trustee, has held said property so delivered to it, or the investments made therefrom by it, in said State of Maryland, and in said City of Baltimore, as said Trustee, ever since the delivery of said property to it, and that said property has never, at any time, since said delivery, been in the State of Virginia, or the City of Norfolk, Virginia, or anywhere else than in the City of Baltimore, Maryland.

[fol. 30] Fourth. That the property so delivered to the said Safe Deposit and Trust Company of Baltimore has, ever since said delivery, been taxed in the State of Maryland, and City of Baltimore, and that the taxes thereon have been paid by said Safe Deposit and Trust Company of Baltimore, which holds the same as Trustee.

Fifth. That there has been paid to the undersigned by said Safe Deposit and Trust Company of Baltimore, as Trustee, the net income derived from said property ever since its delivery to said Trustee, as provided in Item 17 aforesaid of the will of Eliza Andrews, and this income has been duly and properly returned by the undersigned for taxation in the State of Virginia, and the taxes on said income have been duly paid by the undersigned.

Sixth. That the undersigned is ignorant, except as above set forth, as to what is the nature of the property in which the fund held by said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the said will is invested; that she has and exercises no control whatsoever over the property so held by said Safe Deposit and Trust Company of Baltimore, and has no authority to direct the investment of the same, and has no right to dis-

pose of the same, and cannot, in the Courts of this Commonwealth, call said Trustee to account, or cause it to [fol. 31] account for any of its acts as said Trustee; and that the State of Virginia itself has no jurisdiction over said Trustee, or over said property, and no process of any of its Courts, or of any of its Departments, can reach or touch said property or said Trustee, and that the City of Norfolk is likewise without jurisdiction of said fund or said Trustee; and the said Trustee refuses to recognize as valid any tax levied or assessed on said property so held by it as Trustee by either the State of Virginia, or any of the municipalities thereof, and, though requested by the undersigned to join in proceedings of the kind now instituted by the undersigned, has refused to do anything whatever in said matter.

Seventh. That despite the facts above set forth, the said A. Plummer Pannill, Commissioner of the Revenue, has assessed for the years 1924 and 1925 as aforesaid, against the undersigned for taxation all of the corpus of the property so held by the said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the will of Eliza Andrews, said assessments being the identical and same assessments sought herein to be corrected, and against which the undersigned hereby seeks redress.

Eighth. That, as will appear from said Item 17 of the [fol. 32] said will, the undersigned has no vested interest in the property passing thereby, and has only the right to the income therefrom during her life, and that she is charged with no duty relative to the preservation of the corpus of said property, but that this duty is on the Trustee, which holds the same, and that said property receives no protection whatsoever from the State of Virginia, or the City of Norfolk, or by reason of the laws thereof.

Ninth. That the said assessments against her are illegal, null and void, as are the taxes charged against her by reason thereof, and particularly the undersigned charges that said assessments and the taxes charged against her by reason thereof, are contrary to the Constitution of the United States, and especially the provisions of the Fourteenth Amendment thereof, in that it deprives her of her property without due process of law, by reason of the fact

that it attempts to compel her to pay taxes, and causes her to be charged with taxes, on property which she does not own, and over which she has no control or authority, and over which neither the State of Virginia nor the City of Norfolk has any jurisdiction or power; and further violates the Constitution of the United States, and the Fourteenth Amendment thereof, in that it denies her the equal protec-
[fol. 33] tion of the laws of the State of Virginia, by reason of the fact that she would thereby be compelled to pay taxes on property which she does not own, and over which she has no control, and over which neither the State of Virginia nor City of Norfolk has any jurisdiction and power, while other citizens of the State of Virginia are only properly taxed on property owned by them and over which the State of Virginia has jurisdiction and power, except where the same situation exists as is the case with the undersigned.

The undersigned, therefore, applies to the Court, and moves it that it may correct and strike out the illegal assessment and charge of taxes against her aforesaid, and that she may be granted the proper redress herein against the same, and may be relieved from the payment of said taxes now, or in the future.

And she will ever pray.

Lucy B. Brooke, by Robt. B. Tunstall, Attorney.

Executed this 31st July, 1926, by delivering a copy of the within to E. Jeff Roberson, Counselman of City of Norfolk, Va., a Corporation, in the City of Norfolk, wherein he resides and wherein the said Corporation is doing business.

C. H. Tumbleson, City Sergeant, City of Norfolk, by
[fol. 34] Wm. Carmine, Deputy.

Executed in the City of Norfolk, Va., this the 31st day of July, 1926, by serving a Copy hereof on Harry E. McCoy, Commonwealth Attny., City of Norfolk, in person.

C. H. Tumbleson, Sergt. City of Norfolk, Va., by W. Carmine, Deputy.

Executed in the City of Norfolk, Va., this the 31st day of July, 1926, by serving a Copy hereof on W. I. Gilkeson, in person.

C. H. Tumbleson, Sergt. City of Norfolk, Va., by W. Carmine, Deputy.

Executed in the City of Norfolk, Va., this the 31 day of July, 1926, by serving a Copy hereof on A. Plummer Pannill, in person.

C. H. Tumbleson, Sergt. City of Norfolk, Va., by C. B. Lesner, Deputy.

[fol. 35] IN CORPORATION COURT OF CITY OF NORFOLK

ORDER SUBSTITUTING PARTY DEFENDANT AND CONSOLIDATING CAUSES—November 20, 1926

This day came Lucy B. Brooke, by counsel, and representing that the proceeding initiated by notice given by her to the City of Norfolk, a municipal corporation, and R. W. Peatross, its attorney, A. Plummer Pannill, Commissioner of the Revenue of the City of Norfolk, Thomas H. Willcox, Jr., Commonwealth's Attorney of the City of Norfolk and W. I. Gilkeson, Examiner of Records, which proceeding was made returnable on the 7th day of August, 1925, and that certain other proceeding instituted by her in this Court, initiated by notice to the City of Norfolk, a municipal corporation, and R. W. Peatross, its attorney, A. Plummer Pannill, Commissioner of the Revenue, of the City of Norfolk, Harry E. McCoy, Commonwealth's Attorney of the City of Norfolk, and W. I. Gilkeson, Examiner of Records, which latter proceeding was made returnable to the second day of August, 1926, involved identical questions of fact and of law (save as to the matter of facts the years for which her assessments are prayed to be corrected) and further representing that since the institution of the first named proceeding Thomas H. Willcox, Jr., therein named as Commonwealth's Attorney of the City of Norfolk has been succeeded by Harry E. McCoy, who is now Commonwealth's Attorney of the City of Norfolk, moved the Court, first, that the said Harry E. McCoy, [fol. 36] Commonwealth's Attorney as aforesaid, be substituted for Thomas H. Willcox, Jr., named in the first proceedings as Commonwealth's Attorney of the City of Norfolk, and secondly, that the said two proceedings be consolidated; and no objection being made by any of the defendants to either of said motions, the same are granted and

the said Harry E. McCoy, now Commonwealth's Attorney of the City of Norfolk, is substituted for Thomas H. Willcox, Jr., his predecessor in office, and the two said proceedings are hereby consolidated and directed hereafter to be proceeded in together; and the said Harry E. McCoy accordingly proceeded to defend against the petitions so filed in the said consolidated cause.

In Corporation Court of City of Norfolk

Stipulation as to Cause—November 20, 1926

And thereupon A. Plummer Pannill, Commissioner of the Revenue of the City of Norfolk, and W. I. Gilkeson, Examiner of Records, the two officers making the assessments complained of, were examined touching the said applications and testified that the matters and things set up in each of the said applications so filed by the plaintiff were true, but that in their judgment the conclusions sought to be drawn from the said facts by the said plaintiff, Lucy B. Brooke, were incorrectly drawn, and the parties further stipulated and agreed that if the assessments complained of were in contravention of the Constitution of the United [fol. 37] States, the relief prayed for should be granted, and the Court certifies that these were all the matters proved in the case.

In Corporation Court of City of Norfolk

Judgment—November 20, 1926

And thereupon the Court, taking into consideration the facts proved and certified as aforesaid, overruled the contentions of the plaintiff, especially as set forth in the ninth paragraph of each of the plaintiff's applications made as aforesaid, to the effect that the said assessments were illegal, null and void, and particularly the contentions that the assessments and taxes charged against the plaintiff by reason thereof were made and charged contrary to the Constitution of the United States, and especially the provisions of the fourteenth amendment thereof, in that the

said assessments and the taxes charged against the plaintiff by reason thereof deprived the plaintiff of her property without due process of law and denied her the equal protection of the laws and overruled any and all other contentions of the plaintiff based upon the Constitution of the United States; and the Court further acting under the authority of the case of Ellett v. Commonwealth, reported in Volume 132 of the Virginia Reports, at page 136, and of the other several cases cited in the opinion thereto filed, denied the said applications of the said plaintiff, and each [fol. 38] of them, and refused to correct and strike out the assessments and charges of taxes claimed by the plaintiff to have been illegally made.

IN CORPORATION COURT OF CITY OF NORFOLK

ORDER SUSPENDING EXECUTION—November 20, 1926

But on motion of the plaintiff, who desires to present to the Supreme Court of Appeals of Virginia a petition for a writ of error from this order, the Court doth further order that execution hereon be suspended for a period of sixty days upon the execution by the plaintiff of a bond in the sum of $500.00, secured and conditioned according to law.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 40] IN SUPREME COURT OF APPEALS OF VIRGINIA

ORDER DENYING WRIT OF ERROR—February 2, 1927

The petition of Lucy B. Brooke, widow of D. Tucker Brooke, for a writ of error to a judgment rendered by the corporation court of the city of Norfolk on the 20th day of November, 1926, in consolidated proceedings instituted by said petitioner against the City of Norfolk for the purpose of having corrected certain erroneous assessments of personal property for taxation, having been maturely con-

sidered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, the effect of which is to affirm the judgment of the said corporation court.

A Copy. Teste: H. Stewart Jones, Clerk.

[fols. 41 & 42] Clerk's certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

(5560)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1927

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 6, 1927.

(6635)